

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a mechanic for respondent for about 4 and a half years, alleges that he suffered an accidental injury arising out of and in the course of his employment on April 14, 2006. At that time, claimant was working on an engine block which he was going to use to replace an existing block in a Chevy Tahoe. Claimant testified that while he was working on the engine, it began to rotate on the engine stand on which it was mounted. Claimant feared that it would hit him and he jumped up to catch it. When he did this, claimant experienced a sudden pain in his low back, with pain radiating down his left leg. Claimant finished his work that day, telling no one at his job of the incident.

That night, claimant took a hot bath and the pain in his leg resolved and the pain in his back improved. The next morning (Saturday, April 15, 2006), claimant's back pain was somewhat worse, but his leg pain was still gone. As the day progressed, claimant's pain again improved.

That Saturday, Mike Tjaden (claimant's supervisor and respondent's service manager) (hereinafter "Mike") and Mike's brother came to claimant's residence to help claimant move a pool filter which weighed an estimated 300 to 400 pounds. Mike and his brother moved the filter. Claimant only helped rotate the filter once it was in place. Claimant said he experienced no pain and suffered no injuries while helping with the filter. Mike testified that claimant assisted in rotating the filter and, at no time, complained of back pain.

The next morning (Sunday), claimant's pain had again worsened, but the leg pain was still absent. Claimant's pain was worse on Monday morning. When claimant bent to pick up a towel on Monday morning, he suffered a sudden onset of pain that knocked him to his hands and knees. Claimant, for the first time, experienced back spasms. Claimant testified that he did not go to work on Monday, but respondent's records show that claimant clocked in at 7:59 a.m. and clocked out at 9:00 a.m. on Monday. Mike testified that claimant was in pain on Monday and performed no work. Claimant did not tell Mike of a work-related injury. When claimant left respondent's shop, claimant was limping.

Claimant testified that he went to the Wichita Clinic on Monday and then to Wesley Medical Center's emergency room. However, the medical records from Wesley Medical Center indicate claimant appeared there on Tuesday, April 18, 2006, not Monday. Wesley Medical Center's medical history is consistent in that it describes an injury Friday when claimant attempted to stop an engine from falling.

Mike testified that the first time he was made aware that claimant was claiming a work injury was when the Wichita Clinic called for permission to treat claimant. That was on Tuesday, April 18.

Claimant's history is also significant in that claimant had a history of back problems, with claimant going to Dr. Hollinger, a local chiropractor, on several occasions before the

April 14 alleged injury. In fact, claimant was treated by Dr. Hollinger on April 12, two days before the alleged accident, but the entry is not specific regarding which area of claimant's body was treated that day. Claimant acknowledged going to Dr. Hollinger, but testified that his back had never been so bad as after the April 14 accident. Claimant also said his back would improve after Dr. Hollinger's treatments. But, after the April 14 incident, it never completely improved. Additionally, claimant had never suffered leg pain before.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

This Board Member finds that claimant has proven that he suffered accidental injury arising out of and in the course of his employment with respondent.

¹ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2005 Supp. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁵

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.⁶

While it is apparent that claimant had preexisting problems with his back, the incident on April 14, 2006, aggravated the condition. Therefore, the ALJ's finding that claimant suffered a compensable injury or, at the very least, an aggravation of preexisting conditions is affirmed.

Respondent also objects to the authorization of Dr. Stein and the award of temporary total disability compensation.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁷

The ALJ is well within his jurisdiction to order both medical treatment and temporary disability benefits at a preliminary hearing. The Board does not have jurisdiction to review those issues on appeal from a preliminary hearing. Therefore, respondent's appeal on those issues is dismissed.

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁷ K.S.A. 44-534a(a)(2).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the preliminary hearing Order of Administrative Law Judge Thomas Klein dated February 13, 2007, should be, and is hereby, affirmed with regard to the question of the compensability of this claim. Respondent's appeal is dismissed with regard to the issues of claimant's entitlement to medical treatment and temporary total disability compensation.

IT IS SO ORDERED.

Dated this ____ day of April, 2007.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁸ K.S.A. 44-534a.